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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 865.

WILLIAM O. COLE, PLAINTIFF IN ERROR,

vs.

THE CITY OF LA GRANGE.

PHILADELPHIA BAR ASSOCIATION

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JUNE 18, 1884.

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, at the March term, 1884, thereof, between William O. Cole, plaintiff, and The City of La Grange, defendant, a manifest error hath happened, to the great damage of the said plaintiff, William O. Cole, as by his complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 9th day of April, in the year of our Lord one thousand eight hundred and eighty-four.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

A. P. SELBY,
Clerk Circuit Court United States, Eastern District of Missouri.

Allowed by—
[SEAL.] SAMUEL TREAT, *Judge.*

1½ *Return to Writ.*

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of said circuit court, at office, in the city of St. Louis, this 10th day of May, A. D. 1884.

[SEAL.] A. P. SELBY,
Clerk of said Court.

[Endorsed:] No. 2265. United States circuit court, eastern district of Missouri. Wm. O. Cole *vs.* City of La Grange. Writ of error to the circuit court of the U. S., eastern district of Missouri. Returned and filed 9th day of April, 1884. A. P. Selby, clerk.

2 The United States of America to The City of La Grange, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein William O. Cole is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 9th day of April, in the year of our Lord one thousand eight hundred and eighty-four.

SAMUEL TREAT,
Judge United States District Court, Eastern District of Missouri.

2½ Notice, in the foregoing case of citation is hereby waived, this 14th day of April, 1884.

DAVID WAGNER,
For Def't.

[Endorsed:] No. 2265. United States circuit court, eastern district of Missouri. Wm. O. Cole *vs.* City of La Grange. Citation. Filed April 9, 1884. A. P. Selby, clerk.

3 *Assignments of Error.*

UNITED STATES OF AMERICA:

In the Circuit Court, Eastern District of Missouri. March Term, A. D. 1884.

WM. O. COLE *vs.* THE CITY OF LA GRANGE.

1. The circuit court erred in holding void the legislative act to amend an act to incorporate the city of La Grange, approved March 9th, 1871, granting power to issue the bonds from which the coupons in controversy were taken.

2. The circuit court erred in not holding valid the act of the Legislature of March 9th, 1871, granting power to the defendant to issue these bonds from which the coupons in controversy were taken, inasmuch as that act is not repugnant to any implied or specific prohibitions of the constitution of the State of Missouri or of the United States.

3. The circuit court erred in overruling the demurrer of plaintiff to defendant's answer.

4. The circuit court erred in not sustaining the demurrer of the plaintiff to the defendant's answer.

5. The circuit court erred in not finding for the plaintiff and entering judgment in his favor for the amount due upon the coupons sued upon.

3½ [Endorsed:] No. 2265. Wm. O. Cole *vs.* The City of La Grange. Assignment of errors by plaintiff. Filed April 9, 1884. A. P. Selby.

4 UNITED STATES OF AMERICA:

In the Circuit Court, Eastern District of Missouri. March Term, A. D. 1884.

WM. O. COLE *vs.* THE CITY OF LA GRANGE.

It is hereby stipulated and agreed by the parties to this suit, through their attorneys, that this case be submitted to the United States Supreme Court on briefs, under rule twenty.

GEORGE A. SANDERS,
For Pl'ff.
DAVID WAGNER,
For Def't.

4½ [Endorsed:] No. 2265. Wm. O. Cole *vs.* The City of La Grange. Stipulations to submit under rule 20. Filed April 9, 1884. A. P. Selby.

5 *Petition.*

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In the circuit court of the United States in and for said district.

Be it remembered, that on the 19th day of November, A. D. 1883, there was filed in said court a certain petition in words and figures following, to wit:

In the Circuit Court of the United States, Eastern District of Missouri. March Term, 1884.

The plaintiff in this suit, William O. Cole, a citizen and resident of the State of Illinois, by George A. Sanders his attorney, complains of the city of La Grange, a municipal corporation organized and existing under and by virtue of the laws of the State of Missouri, a resident and citizen of the district last aforesaid and defendant in this suit of a plea of trespass on the case on promises:

For that whereas the said defendant heretofore, to wit, on the 14th day of December, A. D. 1871, at, to wit, the district aforesaid, made and executed its, to wit, twenty-five certain bonds each for the sum of one thousand dollars, and bearing date the day and year last aforesaid, together with interest thereon at the rate of eight per cent. per annum, payable semi-annually on the first day of each January and July at the Third National Bank in the city of New York, and then and there delivered said bonds to the La Grange Iron and Steel Company, and which said bonds are exact copies of each other except as to their serial numbers, and bond number twenty-three of said issue is in the words and figures following, to wit:

6 UNITED STATES OF AMERICA:

State of Missouri, City of La Grange.

No. 23. (Vignette.) $1,000.

Know all men by these presents, that the city of La Grange doth for a good, sufficient, and valuable consideration promise to pay to the La Grange Iron and Steel Company, or bearer, the sum of one thousand dollars in current funds, thirty years after the date hereof, at the Third National Bank, city of New York, together with interest thereon at the rate of eight per cent. per annum, payable annually in current funds on the first day of each January and July ensuing the date hereof on presentation and surrender of the annexed interest coupons at said Third National Bank.

This bond is issued under an ordinance of the city council of the said city of La Grange, passed and approved September 22nd, 1871, under and in pursuance of an act of the Legislature of the State of Missouri, entitled "An act to amend an act entitled," an act to incorporate the city of La Grange, approved March 9th, 1971, which became a law and went into force and effect from and after its said approval.

This bond to be negotiable and transferable by delivery thereof.

In testimony whereof the city council of the city of La Grange hath hereunto caused to be affixed the corporate seal of said city and these presents to be signed by the mayor and countersigned by the clerk of the city council of said city this 14th day of December, 1871.

[SEAL] J. A. HAY, *Mayor.*
R. McCHESNEY, *Clerk.*

7 The following certificate is attached to said bonds (and to each one thereof):

J. R. Adams, President. F. Fairman, Treasurer.
W. P. Parding, Secretary.

La Grange Iron and Steel Company, manufacturers of railroad iron, at La Grange, Mo.

For value received, the La Grange Iron and Steel Company hereby guarantees the prompt payment, at maturity, of the interest and principal of the accompanying bond No. 23, being one of a series of two hundred thousand dollars of bonds issued by the city of La Grange, Mo., to the La Grange Iron and Steel Company.

In witness whereof, the said La Grange Iron & Steel Company have, by their president and treasurer, signed and delivered this contract, and affixed thereto the corporate seal of said company, this 10th day of August, 1872.

[SEAL.] J. R. ADAMS, *President.*
F. FAIRMAN, *Treasurer.*

And plaintiff further avers that said bonds were duly executed and issued under and by virtue of an ordinance of said city, of date September 22, 1871, by which an election was authorized to be held

in said city of La Grange on the 4th day of October, 1871, to test the sense of the people of said city upon the question of issuing said bonds, and that in compliance with said ordinance an election was held in said city, in compliance with the charter and ordinance aforesaid, at which election said proposition was adopted by a two-thirds vote of the qualified voters of said city.

And plaintiff avers that after the execution and delivery of said bonds, and before the maturity thereof, to wit, on the first day
8 of September, A. D. 1872, at, to wit, the State of Illinois, for value paid, plaintiff became the owner and holder of twenty-five bonds of the issue of said bonds, and in purchasing the same plaintiff relied upon and had full confidence in the recitals contained upon the face of said bonds, and purchased the same without knowledge or notice of any irregularity or defect existing as to the issue of said bonds, of all of which defendant had due notice.

And plaintiff avers that each of said bonds had attached thereto certain coupons or interest warrants, to evidence the interest accruing upon said bonds, each of said coupons being for the sum of forty dollars, and each representing six months' interest due on each of said bonds, said coupons being more particularly described as follows:

Bond No. 11 has 15 coupons, each for the sum of forty dollars, due respectively each 6 months from January 1, 1873, to January 1, 1880, inclusive, and serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 12 has 15 coupons, each for the sum of forty dollars, due respectively each 6 months from January 1, 1873, to January 1, 1880, inclusive, and serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 37 has 15 coupons, each for the sum of forty dollars, due respectively each 6 months from January 1, 1873, to January 1, 1880, inclusive, and serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 38 has 15 coupons, each for the sum of forty dollars, due respectively each 6 months from January 1, 1873, to January 1, 1880, inclusive, and serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 39 has 15 coupons, each for the sum of forty dollars, due respectively each 6 months from January 1, 1873, to
9 January 1, 1880, inclusive, and serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 47 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to January 1, 1880, inclusive, and serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 48 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1, 1873, to January 1, 1880, inclusive, and serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 49 has 15 coupons, each for the sum of forty dollars, due

respectively each six months from January 1, 1873, to January 1, 1880, inclusive, and serially numbered from 3 to 17, inclusive, aggregating in all the sum of six-hundred dollars.

Bond No. 52 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to January 1st, 1880, inclusive, and serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 53 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to January 1, 1880, inclusive, and serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 54 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to January 1, 1880, inclusive, and serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 55 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to January 1st, 1880, inclusive, and serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

10 Bond No. 56 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to January 1st, 1880, inclusive, serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 57 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to January 1st, 1880, inclusive, serially numbered from 3 to 17, inclusive, *inclusively*, aggregating in all the sum of six hundred dollars.

Bond No. 50 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to January 1st, 1880, inclusive, serially numbered 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 51 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to January 1st, 1880, inclusive, serially numbered 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 58 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to January 1st, 1880, inclusive, serially numbered 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 59 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to January 1st, 1880, inclusive, serially numbered 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 60 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to January 1st, 1880, inclusive, serially numbered 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 61 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to
11 January 1st, 1880, inclusive, serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 62 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to January 1st, 1880, inclusive, serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 63 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to January 1st, 1880, inclusive, serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 64 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to January 1st, 1880, inclusive, serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 65 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to January 1st, 1880, inclusive, serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

Bond No. 66 has 15 coupons, each for the sum of forty dollars, due respectively each six months from January 1st, 1873, to January 1st, 1880, inclusive, serially numbered from 3 to 17, inclusive, aggregating in all the sum of six hundred dollars.

And plaintiff avers that all of said coupons, aggregating the sum of fifteen thousand dollars, were attached to the aforesaid bonds at the time of the purchase of the same by plaintiff on, to wit, the 1st day of September, 1872, at, to wit, the State of Illinois, for value paid and before the maturity of any of said coupons.

And plaintiff avers that said bonds were executed and issued under and by virtue of the power and authority contained in the
12 city charter and amendments thereto of said city of La Grange, section one of article six, of which said charter is in the words and figures following, to wit:

SEC 1. The city council shall have power to levy and collect taxes upon all real and personal property within the limits of the corporation, not to exceed one-half of one per centum per annum upon the assessed valuation thereof, in any manner to be provided by ordinance not repugnant to the constitution of the State of Missouri. And whenever twenty-five persons, who are taxpayers and residents of the city of La Grange, shall petition the city council, setting forth their desire to donate or subscribe to the capital stock of any railroad or manufacturing company, or for the improvement of any road leading into the city, or for increasing the trade, travel, or commerce thereof, or for securing the location and maintenance of any manufacturing company, stating the terms and conditions on which they desire such donation or subscription to be made, it shall be the duty of the city council to order an election to be held, at which the qualified voters of said city shall be allowed to vote; and if it shall appear from the returns of said election that two-thirds of the resident taxpayers have voted in favor of such donation or subscription it shall be declared carried by proclamation of the mayor, and a special tax of not exceeding two per centum per annum may be levied on the assessed value of real and personal property to pay

such donation or subscription, and the city council shall, under the hand of the mayor and attested by the seal of said city, issue bonds of the city of La Grange to the amount of the capital stock so subscribed or to the amount of the donation made to any such enterprise, or for any purpose hereinbefore specified, which said bonds shall be conditioned upon the proposition submitted and voted upon at
13 the election held for that purpose, and said bonds shall not bear a greater rate of interest than ten per centum per annum. And when such bonds shall have been so issued all taxes levied for State and county revenue and all special taxes, of whatsoever kind, upon the property of such manufacturing companies and other manufacturing enterprises within the limits of said city of La Grange, to the procurement, erection, and maintenance of which any aid as above specified shall have been, or may be hereafter, given by said city, shall annually be levied and collected in the usual manner, and when so collected shall be paid by the collector of Lewis county to the treasurer of the city of La Grange, the county collector taking duplicate receipts therefor, one of which shall be filed with the city auditor. The city treasurer shall hold the amounts so received until three thousand dollars may be in his hands, and whenever the sum so received amounts to this sum (of three thousand dollars) it shall be his duty, under the direction and order of the city council, to take bids for bonds of the city of La Grange and purchase said bonds at the lowest possible rate, not exceeding the par value thereof; and if no such bonds are offered at their par value or less, he shall then, upon order of the council, invest the said money in interest-bearing securities of the United States, State of Missouri, or Lewis county, having a market value, at that value, and with them form a sinking fund; and under the order of the council he shall at any time purchase and cancel the bonds of the city of La Grange with any money or securities which may be in the sinking fund, provided said city bonds are bought at par value or less, and said money or securities shall be used for no other purpose than as above specified until all the bonds of the city of La Grange so issued shall have been
14 purchased and cancelled and the city of La Grange refunded all monies it may have advanced or paid out as interest on such bonds, and then these monies shall become a permanent school fund for the city, the interest of which only shall be used for the support and maintenance of the public schools therein.

By means whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay to the said plaintiff the said sums of money in the said several interest warrants or coupons specified according to the tenor and effect thereof; and being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at the district last aforesaid, undertook and then and there promised the said plaintiff well and truly to pay unto the said plaintiff the said sums of money in the said several interest warrants or coupons specified according to the tenor and effect of the said interest warrants or coupons.

For that whereas, the said defendant, on the first day of October,

in the year of our Lord one thousand eight hundred and eighty-three, at, to wit, the district last aforesaid, was indebted to the said plaintiff in the sum of fifty thousand dollars of lawful money of the United States of America, for money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of the said defendant. And for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant, and at the like request of the defendant. And for other money by the said defendant before that time had and received to and for the use of the said plaintiff. And being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook
15 and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested.

And whereas, also, the defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid; and upon such accounting the said defendant then and there was found in arrear- and indebted to the said plaintiff in the further sum of fifty thousand dollars, of like lawful money as aforesaid; and being so found in arrear- and indebted to the plaintiff, the defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook, and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned, when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant (although often requested, &c.) has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof, to the said plaintiff, but to pay the same, or any part thereof, to the said plaintiff the said defendant hath hitherto altogether refused, and still doth refuse, to the damage of the said plaintiff of fifty thousand dollars. And therefore said plaintiff brings suit, &c.

GEORGE A. SANDERS,
Att'y for Plaintiff.

16 The City of La Grange, Missouri, to William O. Cole, Dr.

To money lent and advanced	$50,000
To money paid, laid out & expended	50,000
To money had & received to and for the use of plaintiff	50,000
To money due for interest and for bearance	50,000
To balance due on account stated	50,000

Summons.

UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the Circuit Court of the United States in and for said District.

The President of the United States of America to the Marshal of the United States in and for said district, Greeting:

You are hereby commanded to summon the City of La Grange, a citizen of the State of Missouri, that it be and appear before the honorable circuit court of the United States in and for the eastern district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for said district, on the third Monday of March next, then and there to answer the complaint of William A. Cole, a citizen of the State of Illinois, as set forth in the petition filed in said court on the 19th day of November, A. D. eighteen hundred and eighty-three.

Hereof fail not, and have you then and there this writ.

Witness, the Honorable Morrison R. Waite, Chief Justice
17 of the Supreme Court of the United States, the 23rd day of November, A. D. eighteen hundred and eighty-three.

Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] A. P. SELBY, *Clerk,*
By F. E. McCRARY, *Deputy.*

Return on Summons.

UNITED STATES OF AMERICA, } sct:
Eastern District of Missouri, }

I return on this writ that I have executed the same by delivering a copy thereof together with the petition thereto attached to Louis Schneider, the mayor of the city of La Grange, the within named defendant, on the 4th day of December, A. D. 1883, in the said city of La Grange, in Lewis county, in the above district.

FELIX COSTE,
United States Marshal, Eastern District of Missouri,
By W. J. DAUGHERTY, *Deputy.*

And afterwards, to wit, on the 18th day of March, A. D. 1884, there was filed in said cause a certain answer in words and figures following, to wit:

Answer.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States, in and for the Eastern District of Missouri. March Term, 1884.

WILLIAM O. COLE, Pl'ff, *vs.* THE CITY OF LA GRANGE, Def't.

And now comes the defendant, and for answer to plaintiff's
18 petition, denies each and every material allegation contained

therein, and denies that plaintiff is entitled to recover the amount claimed in said petition or any other amount whatever.

And for a further answer defendant says that the act of the Legislature mentioned in said petition, approved March 9, 1871, attempted to give, and by terms did give, to the said city defendant authority to make gifts and donations to private manufacturing associations and corporations, and that the said city council of said defendant, purporting to act under such power or authority by an ordinance adopted September 22d, 1871, a copy of which is filed in the case of Sanford against this defendant, now pending in this court, did submit to a vote of the citizens of said defendant a proposition to give or donate to the La Grange Iron and Steel Works, a private manufacturing company formed and established for the purpose of carrying on and operating a rolling mill, the sum of two hundred thousand dollars, and in accordance with said ordinance the bonds of said city defendant was issued, together with interest coupons attached thereto, a part of which coupons are the ones set forth and described in the petition and herein sued on.

And the defendant avers that the said bonds and coupons were issued to said manufacturing company, which was a strictly private enterprise formed and prosecuted for the purpose of private gain, and which had nothing whatever of a public character, and that it was incompetent for the Legislature to grant authority to cities or towns to make donations and issue bonds to mere private companies or associations having no public functions to perform, and that the act of the Legislature in this regard and the ordinance of Sept. 22nd, 1871, were void; wherefore defendant alleges that the said bonds and coupons were issued without any legal authority, and are
19 wholly void; and now, having answered, asks to be dismissed with costs.

DAVID WAGNER,
Att'y for Def't.

EXHIBIT "A" TO ANSWER.

CITY HALL, LA GRANGE, MO., *Sept.* 21, 1871.

At an adjourned meeting of the city council held in the afternoon of the above date, among other proceedings the following ordinance was introduced by Mayor Hay:

Be it ordained by the city council of the city of La Grange, as follows:

That upon petition of John M. Glover and twenty-five other tax payers of said city, that an election be and is hereby ordered to be held at the city hall in said city on Wednesday, the fourth day of October next, to test the sense of the legal voters of said city on the propriety of the said city donating ten (10) acres of land and two hundred thousand dollars ($200,000) in city bonds, to be due in thirty years from date, and to bear interest at the rate of eight per cent. per annum, the interest to be paid semi-annually at New York or Boston to Isaac R. Adams and associates, in consideration that the said Isaac R. Adams and associates will build and construct at the city of La Grange a rolling iron mill of sufficient capacity to

roll twenty-five thousand (25,000) tons of railroad iron per annum the said mill to be built within one year from the date of the election herein ordered, and the said company shall operate and maintain the same at the city of La Grange for the term of twenty years from its completion, in accordance with memorandum and agreement here filed of this date; and on the ballot of each voter shall be written or printed "For the donation," or "Against the donation."

20 Adopted Sept. 22nd, 1871.

J. A. HAY, *Mayor*

Attest: ROB'T McCHESNEY, *Clerk.*

Councilman Simpson moved that the ordinance be adopted and the clerk instructed to have it printed and posted up. Motion carried.

CITY CLERK'S OFFICE, LA GRANGE, MO., *March* 14, 1884.

I hereby certify that the above is a true copy of the ordinance as it appears on the record of the city of La Grange.

Attest: [SEAL.] J. B. SUDDUTH, *City Clerk.*

And afterwards, to wit, on the 21st day of March, A. D. 1884, there was filed in said cause, a certain demurrer, which said demurrer is in the words and figures following, to wit:

Demurrer to Answer.

UNITED STATES OF AMERICA:

In the Circuit Court of the United States in and for the Eastern District of Missouri. March Term, A. D. 1884.

WM. O. COLE *vs.* THE CITY OF LA GRANGE.

And now comes the plaintiff and demurs to the answer of the defendant to plaintiff's petition herein, and says that the matters and things set forth in defendant's answer are not sufficient in law to defeat the plaintiff's cause of action, and of this he prays judgment etc.

GEO. A. SANDERS,
Att'y for Plaintiff.

21 And on said 21st day of March, A. D. 1884, the following appears of record in said cause, to wit:

Demurrer Overruled.

WILLIAM O. COLE, Plaintiff,
vs
CITY OF LA GRANGE, Defendant.

Now comes the plaintiff, by attorney, and files demurrer to answer, which said demurrer is urgued by counsel, and submitted, and by the court taken under advisement and overruled.

22 Upon the hearing of the demurrer the following opinion was rendered by Honorable Samuel Treat, judge:

Opinion of the Court.

COLE
vs.
CITY OF LA GRANGE. } No. 2265.

SANFORD
vs.
CITY OF LA GRANGE. } No. 2308.

Demurrers to the Answers.

These cases rest on the same facts and propositions of law. The purpose is to have the judgment of the court on the special defence set up; yet the demurrer is general and each answer contains a general denial.

That technical point seems to have been overlooked, but as the parties have presented the subject on the special defences, by mutual understanding, the court announces its views with respect thereto.

It is not deemed necessary to travel over the ground, theoretical and elemental, on which the many cases cited rest, for the books and adjudged cases are full of the law-learning involved.

The main proposition always is as to the authority of a county or town or city to incur the obligation sued on, whether evidenced by a bond or otherwise. In these cases the suits are on coupons detached from bonds issued by the defendant, pursuant to the required vote of the citizens, as a gift to a private manufacturing corporation.

23 There was a legislative enactment, to wit, the charter of the defendant, which in terms permitted the issue of the bonds, the proper vote, &c., having been duly had.

The State constitution contains this clause:

"The General Assembly shall not authorize any county, city, or town to become a stockholder in, or loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto."

It is contended that as there is no specific prohibition in the constitution against the issue by a city of its bonds as a gift to a private enterprise, if a two-thirds majority of the citizens so vote, the bonds must be held valid in the hands of *bona fide* holders, and the property within the corporate limits remain subject to taxation to meet such alleged obligations.

It is true the State constitution in express terms refers only to becoming a stockholder or loaning credit, and says nothing about gifts. Why not? Because it was considered by all familiar with elemental principles of free governments that they were not founded

and did not exist for the confiscation of private rights, or through the exercise of the taxing power appropriate one man's property for the private benefit of another.

The court, at the close of the argument, asked if it was contended that inasmuch as the constitution required a two-thirds vote only as to becoming a stockholder or loaning municipal credit, therefore a city could without a vote give away its corporate funds or revenues, or impose a tax to make good a promised gift.

24 Inasmuch as it is beyond the legitimate sphere of municipalities to use their taxing or other functions for mere private interests, and inasmuch as it had been settled that they could, as stockholders or otherwise, aid public enterprises, there was need of restricting the latter by exacting a vote of the people; but no need of providing against the former. It is not a "*casus omissus*," nor an intentional license for indiscrimate squandering of revenues by way of donations. When the required vote is had for stock or loans, it is supposed the city receives value or security therefor, and the constitution placed restrictions thereon. It is to be asserted that because no such restrictions were placed on gifts, that therefore the two-thirds of the voters of a city could impose on all taxable property, heavy taxes for years to make good a mere gift to a private manufacturing corporation? The question answers itself. If such a cause could be pursued for one private enterprise, it could for all.

It is not necessary to review the many cases cited. A court cannot ignore that the Federal and State constitution—nay, that all State constitutions—prohibit the taking of private property even for public uses, without just compensation. Is it to be argued, therefore, that private property can be taken for private uses, either with or without just compensation?

The Supreme Court of the United States stated the elemental though underlying American constitutional law, when it declared that an attempt through the guise of the taxing power to take one man's property for the private benefit of another, is void—an act of spoliation, and not a lawful use of legislative or municipal functions.

25 There have been so many well considered cases in the U. S. courts and in State courts on this subject, that it would be a work of supererogation to repeat their arguments.

It must suffice that the weights of authority and sound reason concur in holding bonds and coupons like those in question, void *ab initio*.

Loan As. *vs.* Topeka, 20 Wall., 655.
Com. Bank *vs.* Iola, 2 Dill., 353.
Parkersburg *vs.* Bown, 106 U. S. Rep., 487.
Allen *vs.* Jay, 12 (N. S.) Am. L. Reg., 481, with note.
State *vs.* State University, 57 Mo., 178.
St. Louis County *vs.* Griswold, 58 Ib., 175.
Livingston Co. *vs.* Darlington, 101 U. S., 407.

In Cooley's Constitutional Limitations, the subject is fully discussed, cases reviewed, and conclusions stated. Pp. 264 *et seq.*

Demurrers overruled.

And afterwards, on the ninth day of April, 1884, at said term of court, the following further proceedings were had, and appear of record in said case, to wit:

Judgment.

WILLIAM O. COLE, Plaintiff,
vs. } 2265.
CITY OF LA GRANGE, Defendant.

Now come the parties, by their respective attorneys, the plaintiff by Sanders and Haynes, and the defendant by David Wagner; and the demurrer of plaintiff to defendant's answer having been heretofore overruled, and the plaintiff electing to abide by said
26 demurrer, it is ordered, on motion, that judgment be entered herein for the said defendant.

Writ of Error Allowed.

It is therefore considered by the court that the plaintiff take nothing by his writ herein; that the defendant, The City of La Grange, go hence without day and have and recover of said plaintiff, William O. Cole, its costs herein laid out and expended, and that a fee-bill or execution issue therefor. And thereupon the plaintiff presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said defendant to be and appear at a Supreme Court of the United States at the next term thereof, on the second Monday in October next; which said writ of error is allowed and said citation signed by the judge. And said plaintiff also presents to the court his bond in the penal sum of five hundred dollars, which bond is approved and ordered to be filed.

Said bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents, that we, William O. Cole, of Chicago, Illinois, and D. K. Ferguson, of the city of St. Louis, Missouri, are held and firmly bound unto The City of La Grange, Missouri, in the sum of five hundred dollars, to be paid to the said city of La Grange; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this thirtieth day of March, A. D. 1884.

Whereas the above-named William O. Cole hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the eastern district of Missouri: Now,
27 therefore, the condition of this obligation is such, that if the above-named William O. Cole shall prosecute his said writ of error to effect, and answer all costs if he shall fail to make good

his plea, then this obligation shall be null and void; otherwise, the same shall be and remain in full force and virtue.

Sealed and delivered in the presence of—

WILLIAM O. COLE.
D. K. FERGUSON.

In the Circuit Court of the United States for the Eastern District of Missouri. To the March Term, 1884.

WILLIAM O. COLE, Plaintiff in Error.
vs.
THE CITY OF LA GRANGE, MISSOURI, Def't.

Approved by—
SAMUEL TREAT, *Judge*.

28 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings in case No. 2265, of William O. Cole, plaintiff, against City of La Grange, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district, this 14th day of May, in the year of our Lord eighteen hundred and eighty-four.

A. P. SELBY,
Clerk of said Court.

29 [Endorsed:] No. 2265. United States circuit court, eastern district of Missouri. William O. Cole against City of La Grange. Duly certified transcript in the above entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 865. William O. Cole, plaintiff in error, *vs.* The City of La Grange. Filed 18th June, 1884.

113—1

IN THE

UNITED STATES SUPREME COURT,

OCTOBER TERM, A. D. 1884.

WM. D. COLES, *Plaintiff,*

vs.

THE CITY OF LAURANCE, MISSOURI, *Defendant.*

PHILADELPHIA BAR ASSOCIATION

BRIEF AND ARGUMENT.

GEO. A. SANDERS,
For Plaintiff.

SPRINGFIELD, ILL.:
H. W. ROKKER PRINTER AND BINDER.
1884.

IN THE

UNITED STATES SUPREME COURT,

OCTOBER TERM, A. D. 1884.

WM. O. COLE, *Plaintiff*,

vs.

THE CITY OF LaGRANGE, MISSOURI, *Defendant.*

BRIEF AND ARGUMENT.

STATEMENT.

The coupons in controversy in this case were cut from bonds which were a part of an issue of $200,000 by the city of La Grange, Mo., the defendant to the LaGrange Iron and Steel Company, or bearer, dated December 14, 1871, and due in thirty years from date. They represent interest accrued on bonds at 8 per cent. per annum, and payable semi-annually at Third National Bank, New York, July and January 1.

Only $100,000 of these bonds were delivered to the Iron and Steel Co. The other $100,000 were delivered to a Quincy, Ill.,

bank, to be held in escrow, and said $100,000 were supposed to have been stolen when the bank was robbed. The bonds from which these coupons are cut are all numbered under the first $100,000 delivered to said Iron and Steel Company.

These bonds were issued under an ordinance of the city council, passed and approved September 22, 1871, and a vote of over two-thirds of the voters, (236 in favor of the donation, 4 against, for which donation they were issued) held on the 4th day of October, 1871, and in pursuance of an act of the Legislature of Missouri, entitled "An act to amend an act entitled 'An act to incorporate the city of LaGrange,' approved March 9, 1871," which became a law and went into force and effect from and after its approval.

These bonds were purchased for valuable consideration, before maturity and default in their interest, by *bona fide* holders, without notice of any want of power to issue, or any irregularity of issue, save what appears upon the bonds and in the laws under which they were issued.

The City of LaGrange paid the interest on these bonds regularly and promptly when due for several years, and have since repudiated their obligation and refused to pay the coupons in suit.

They have refused to pay them on the ground that their acts in their issue was *ultra vires*, and that they were prohibited by law from issuing bonds in aid of a private corporation.

[Copy of bond No. 23, City of LaGrange, Mo.]

"UNITED STATES OF AMERICA.

STATE OF MISSOURI,

No. 23. (Vignette.) $1,000

CITY OF LAGRANGE.

"*Know all Men by these Presents*, That the City of LaGrange doth, for a good, sufficient and valuable consideration, promise

to pay to the LaGrange Iron and Steel Company, or bearer, the sum of One Thousand Dollars, in current funds, thirty years after date hereof, at the Third National Bank, City of New York, together with interest thereon at the rate of eight per cent. per annum, payable semi-annually, in current funds, on the first day of each January and July ensuing the date hereof, on presentation and surrender of the annexed interest coupons at said Third National Bank. This bond is issued under an ordinance of the city council of said City of LaGrange, passed and approved September 22, 1871, under and in pursuance of an act of the Legislature of the State of Missouri, entitled "An act to amend an act entitled 'An act to incorporate the City of LaGrange,' approved March 9, 1871," which became a law and went into force and effect from and after its said approval. This bond to be negotiable and transferable by delivery thereof.

"*In testimony whereof*, The city council of the City of LaGrange hath heretofore caused to be affixed the corporate seal of said city, and these presents to be signed by the mayor, and countersigned by the clerk of the city council of said city, this 14th day of December, 1871.

[SEAL.]

J. A. HAY,
Mayor."

R. MCCHESNEY,
Clerk.

[Copy of Coupon Series No. 60, from Bond No. 23.]

"THE CITY OF LAGRANGE

$40.00.

Will pay to the holder hereof, on the first day of July, 1901, Forty Dollars, at the Third National Bank, New York, on presentation hereof, being the interest due that day on Bond No. 23, issued under an ordinance of said city, and approved September 22, 1871, and under an act of the Legislature of the State of Missouri, entitled "An act to amend an act entitled 'An act to incorporate the City of LaGrange,' approved March 9, 1871," which became a law and went into force and effect from and after its approval.

J. A. HAY,
Mayor."

R. MCCHESNEY,
Clerk.

All other bonds and coupons are fac-simile of the above, save as to Nos. of bonds and serial Nos. of coupons, and the date when due.

The question is purely one of law, all of the facts being conceded.

The Plaintiff filed his Petition. (Record, page 3). The Defendant answers and files Exhibit A. (Record, page 11 and 12). The Plaintiff demurs to the answer, and the Court below overrules the Plaintiff's dumurrer. From which judgement on demurrer plaintiff obtains his writ of error to this Court.

ASSIGNMENTS OF ERROR.

1. The Circuit Court erred in holding void the legislative act to amend an act to incorporate the City of LaGrange, approved March 9th, 1871, granting power to issue the bonds from which the coupons in controversy were taken.

2. The Circuit Court erred in not holding valid the act of the legislature of March 9th, 1871, granting power to the defendant to issue these bonds from which the coupons in controversy were taken, in as much as that act is not repugnant to any implied or specific prohibitions of the constitution of the State of Missouri, or of the United States.

3. The Circuit Court erred in overruling the demurrer of plaintiff to the defendant's answer.

4. The Circuit Court erred in not sustaining the demurrer of the plaintiff to the defendant's answer.

5. The Circuit Court erred in not finding for the plaintiff and entering judgment in his favor for the amount due upon the coupons sued upon.

BRIEF AND ARGUMENT.

The coupons in controversy in this suit were attached to bonds issued under an act of the Legislature of Missouri, entitled "An act to amend an act entitled 'An act to incorporate the City of LaGrange, Mo.,' approved March 9, 1871," and which became a law and went into effect from and after its approval; and also an ordinance of the city council passed and approved September 22, 1871, and a vote of over *two-thirds* of the voters —236 being in favor of the proposition and 4 against—held on the 4th day of October, 1871.

The bonds were dated December 14, 1871, and signed by the mayor, and attested by the city clerk and his seal. The vote was for $200,000 of bonds, with interest at eight per cent.,

payable semi-annually in New York City, and to run thirty years. They were issued to the LaGrange Iron and Steel Company, or bearer. $100,000 of the bonds were delivered to said company, and the other $100,000 placed in escrow in a bank in Quincy, Ill., which was subsequently robbed, and this $100,000 has not since been heard of. The coupons sued on are all from bonds of numbers under 100.

The requirements of the legislative act conferring the power and the ordinance of the city, having all been fully complied with, and the assent of two-thirds of the voters having been obtained, these coupons are valid obligations of the City of LaGrange, unless their issue was prohibited by the Constitution of the State of Missouri—that of 1865—then in force in that State.

It is affirmed by the defense that these bonds and coupons being issued to the LaGrange Iron and Steel Company, a private corporation, as is claimed, are therefore prohibited by Section 14, Article 11, of the Constitution of Missouri of 1865. That section reads as follows:

> "The General Assembly shall not authorize any county, city, or town to become a stockholder in, or loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

There is here no constitutional prohibition whatever in cases where the question is fairly submitted to the voters of the county, city or town at a regular or special election, and two-thirds of the voters assent to the proposition to loan their credit to any company, association or corporation they may choose. The only restriction is as to the assent of two-thirds of the voters, and not a word is said as to the nature of the

company, association or corporation, whether public ior prvate, or as to the kind of business to be engaged in, whether educational, industrial, mechanical or benevolent. All these questions are left, as they should be, to the wisdom, integrity and good sense of the people, who are to pay the taxes, expressed at an election held for that purpose. They are the best and only judges of what kind of companies, associations or corporations they are willing to pay their taxes to support and encourage, and which will best benefit the community in which they live.

We claim that the important questions in this case have been settled both in the State and Federal courts. A construction of Section 14, Article 11, of the Constitution of Missouri was given in *State* v. *Curators of State*, 57 Mo. 178, in which an injunction was sought to prohibit the issue of $75,000 of bonds by Phelps county, in aid of the School of Mines and Metalurgy, at Rolla, Mo., and the injunction was granted *because there had been no election and no assent of two thirds of the voters, which is the all important and only restriction in that section of the Constitution.*

The court say, in construing this Section 14:

"What was the object of the restriction on county, city and town municipalities? *The object plainly was, to prevent them taxing the people without their consent.* No loan or credit was allowed to any company, association or corporation without the consent of the people who had to pay it. The business of the company, association or corporation is not referred to in the constitution—whether educational, benevolent, industrial or otherwise—whether public or private. *The object is not considered. It is manifestly the intention of the Constitution to prevent taxation without the assent of the tax-payers, and without regard to the purpose of the tax.*" (Page 108, *supra.*)

Again, in the same case, the court say:

"It was thought, no doubt, that the people might as well be consulted in a contribution to a college as a contribution to a

railroad, or any other industrial or mechanical enterprise. *No distinction was made by the Constitution, and this court is without power to make any. Nothing is said in the Constitution about public corporations, as distinguished from private corporations. We are unable to perceive any ground for such discrimination.*" * * * "When the proposed issue is not sanctioned by the requisite vote, we think it a suitable time to prevent the issue. *After such bonds have been put upon the market, and purchasers have invested in them, the question of their validity depends upon essentially different principles.* (Page 184, *supra.*)

In the above case the Supreme Court, in interpreting this Section 14, Article 11, of their own Constitution, clearly hold that the prohibition is only to obtain the assent of the tax-payers, and that there is not, nor can be, any discrimination against private corporations, either by direct statement or implication, but that the essential thing sought for, and the whole object of the section, was the two-thirds vote of the electors. In the case at bar the vote was had, and was practically unanimous.

In *St. Louis Co.* v. *Griswold et al.*, 58 Mo. 175, it was held that "Courts cannot declare an act of the Legislature void, no matter how unjust or impolitic it may be, unless it clearly conflicts with *specific prohibitions of the Constitution.*"

The Legislature of Missouri authorized the appropriation of land for a public park, for the benefit of the inhabitants of St. Louis county, located in the eastern portion of said county, near to, and outside of the corporate limits of the city of St. Louis. *Held:* That "this is a public use, notwithstanding it would be chiefly beneficial to the inhabitants of the city, and that the act was not unconstitutional."

Here, again, the Supreme Court of Missouri, in construing this same section 14, of Article 11, of their Constitution, reaffirm all that was held in 57 Missouri, *supra*, but decide that there is no prohibition in that section on the Legislature granting power to

the people of a county to aid in establishing a *public park*, and that, too, when it would be chiefly beneficial to a city near by, and that such a park would be for a public purpose.

"In the construction of the grant of powers, * * * something may be trusted to the wisdom and integrity, as well as the interest, of the body appointed to execute the power. * * * Even if the case had been doubtful, inasmuch as the city authorities have given this construction to the charter, and bonds have been issued and in the hands of *bona fide* purchasers for value, we should have felt bound to acquiesce in it."

Van Hostrop v. *Madison City*, U. S. 1 Wall, 393.

"If there is a reasonable doubt upon the question (of the constitutionality of an act), the act should be sustained, without reference to any evil consequences which might have followed a different result."

Knickerbocker v. *The People*, 102 Ill. 218.

"*The courts will not pronounce a statute unconstitutional and void in a doubtful case, but only when its repugnancy to the Constitution is clear and apparent.*"

Richards v. *Raymond*, 92 Ill. 612.

"In the enactment of laws, the Legislature must exercise its judgment and discretion. As to questions of pure policy and expediency, no express or necessarily implied constitutional provisions intervening, *it is the sole judge*. It has also the undoubted right to take a comprehensive view in determining the necessity of a law, and the character of the purpose to be accomplished. *A court, with any propriety, cannot arrogate to itself all power and wisdom in such matters; and if there be a grave doubt as to the nature of the purpose, the doubt must always be solved in favor of the action of the Legislature.*"

C. D. & V. R. R. Co., et al. v. *Smith*, 62 Ill. 271.

From the above citations it will be readily seen that courts have no power to render void legislative acts, unless there is a positive constitutional prohibition to the enactment, and that where there is any doubt, the legislative act must be sustained.

The acts of the defendant under the powers given in this case, are not *ultra vires*, and it is estopped from denying a power which

it construed, acted upon and received the benefits thereof, and now continues to enjoy the same.

National Bank v. *Matthews*, 98 U. S. 629.
Sedgewick (Stat. and Const. Constr.), 73.
Dillon Muni. Corp., Vol. 2, 3d ed., Sec. 936.
Hickox v. *Galveston*, 96 U. S. 341.
2 Parsons on Contracts, 790.
Field on Corporations, 273, Sec. 8.
Town of Coloma v. *Eaves*, 92 U. S. 484–93.
Gelpecke v. *Dubuque*, 1 Wall. 175–202.

The question in the case at bar is, whether the Legislature had a right to grant authority for a municipal corporation to issue these bonds, under the Constitution of Missouri, to such a corporation. It is a question of *power* to *issue*, as the mode of execution was regular and the legislative act and city ordinance were fully complied with.

In this case the first source of power is the Constitution of Missouri, voted upon and adopted by the people of the State, and is therefore the will of the people expressed as to the questions therein submitted. They therein voted that municipal corporations should not lend their aid to any company, association or corporation, *unless upon a two-thirds vote of the electors*, or in other words, if two-thirds of the voters of any municipality choose to vote to be taxed to pay for the establishing and carrying forward corporate enterprises which, in the opinion of the electors, would benefit the municipality, they should have the right to do so; and why should not the tax-payers have a right, under legislative authority, to bind themselves to pay their money to whatever object they please, that does not conflict with the organic law

of the State, and that is not inimical to the public interests? The limitations here are sufficient to protect any abuse of the taxing power. First, the Constitution limits its exercise to a two-thirds vote of the electors. This is more than is frequently obtained in favor of public improvements under municipal authority where often but a small majority is obtained. Then the legislative act limits the rate of taxation, so there was no danger of an indefinite use and abuse of the power granted. Then, again, the city council passed an ordinance accepting the legislative, as well as constitutional power, and submitting it to the vote of the electors. There were 236 votes for issuing $200,000 of city bonds to aid this company, to establish its works in the city, and 4 votes against it. More than two-thirds answered to the proposition, and it was practically unanimous. Here is a careful compliance with a power granted, first by the Constitution and then by the Legislature, specially given and accepted by an ordinance of the city council and voted upon by the electors. From the very first source of power, to the last use of it, all the requirements of the laws were complied with. But we are referred to the *Loan Association* v. *Topeka*, 20 Wall. 655, as settling the law in this case. We do not so consider it. The cases are unlike in some of their most important features.

The Loan Association of Topeka, was not the unanimous decision of this Court, and we think the dissenting opinion of Justice Clifford more in accord with the rulings of the Court since that time. That decision was rendered October, 1874, and since that time there have been several decisions that seem to sustain the opinion of Justice Clifford on the points involved in that case.

County of Livingston v. *Darlington*, 101. U. S. 407, and *Citations*.

In the *Loan Association* vs. *Topeka case*, the Constitution of Kansas required that provisions be made by the Legislature that would restrict and limit the use of the power given to municipalities in borrowing money and contracting debts and loaning their credit.

The Legislative Act, in the *Topeka case* provided, "That no greater amount than one thousand dollars shall be granted for any one purpose, *unless a majority of the votes cast at an election called for that purpose, shall authorize the same.*"

This statute permitted the use of one thousand dollars by the municipalities *without a vote*, but *any sum* that a majority of the people should vote for was thereby authorized.

This was, it is contended, in violation of Sec. 5 of the Kansas Constitution which reads, "*Provision shall be made by general law for the orginization of cities, towns, and villages; and their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power.*"

Here the Legislative Act was held void, because there was no restriction as to the amount the majority of the people might vote to aid the given enterprise.

In the case at bar there was a full and accurate compliance with all the Constitutional requirements, and the Legislature limited the amount of taxation for the payment of the bonds to two per centum of the value of real and personal property.

These distinctions are very important, for in the *Topeka case* the dicision is based upon the unlimited and unwarranted use of the taxing power.

But counsel will argue that in the *Topeka case*, the question to be decided is *not the extent of the use of the taxing power*, but that *in*

no case can taxes be levied and collected by municipalities in aid of any but public enterprises.

Under this view of the case, it becomes all important to know what is a public purpose or enterprise for which taxation can be allowed, and who is to determine for what taxes are to be paid, whether for public or private purposes or for both; and to answer this, we refer to the decision of this Court in *County of Livingston v. Darlington*, 101. U. S. 407, where the subject is discussed, and where bonds issued to purchase a site for a State Reform School are held good.

Counsel refer to *Parkersburg vs. Brown*, 106. U. S. 487, but in that case the Constitution did not authorize the Legislative Act under which the bonds were issued, the Legislative Act being unconstitutional. In the case at bar, the Legislative Act is in harmony with the State Constitution, and the acts of the city are in conformity with the Legislative Act and the Constitution.

The question in this case is, whether a city having Constitutional and Legislative authority, and a vote of more than two-thirds of its tax-payers, can tax the property of the citizens to pay for bonds issued for what they believed to be a public enterprise worthy of their support. If this Court hold with the Court below that it has not, then the rule of power in this country is reversed, and the majority no longer rule; but the two-thirds of the people must yield to the one-third, and the minority rule instead of the majority prevail. If a majority of the tax-payers cannot determine what they will do with their taxes, neither could nine-tenths, or even the entire community. If the Courts can interfere and set aside the action of two-thirds of the tax-payers, authorized by the Constitution, Legislature and City Council, as in this

case, then they could do it if the votes were unanimous. All property is then lodged in the hands of the Courts, and no municipality can dispose of the property of its tax-payers by taxation, even when ordered to do so by the tax-payers. This would be a despotism of Courts, and we cannot believe it to be the Law. It is very difficult to draw the line of distinction where public and private enterprises begin and end. While admitting that the Courts are the ultimate tribunal for determining, in any given case, whether an act is constitutional or not, and whether the enterprise aided is a public one or not, yet they can only determine whether a given case falls within their accepted rule of action. But the rule of decisions of Courts on this subject constantly varies, according to the exigencies of the people. In England, at one time, grist mills received public support, or support from the taxing power. Markets and fairs in that and this country, water mills and powers, railroads, machine shops, manufacturing enterprises, bounty payments, location and support of State schools of various kinds, have been, and are aided by the taxing power under the decision of the Courts. The will of the people is the scource of power, and ultimately that must prevail.

They are the most competent to judge of what is a proper expenditure of their property by taxation, and the despotism of the majority in matters of taxation can never be very dangerous in this country. The power through the constitution and legislature to act, and the action of the people, freely and without fraud, exercised under those powers granted, will always be respected by the courts. Otherwise the stubborn selfishness of one man might deprive a municipality of vast benefits that would accrue to every taxpayer by virtue of some great public enterprise which he would be able to defeat over a majority of his fellow-taxpayers. Surely the public interests of every municipality are not to be left in the

hands of one, or a very few men—they must be and can only be left in the hands of the majority of voters exercising their will under reasonable organic and legislative restrictions. It is the province of courts to see that the will of the people under such circumstances is protected.

In the case of *Allem* v. *Inhabitants of Jay*, 12 N. S. Am. L. Reg. 481, with note, the argument is fearfully extenuated. The learned judge fears that eventually all property will be gathered into the public treasury and redistributed through the channels of public improvement. But there is no possible danger of this as long as the legislators are fresh from the people every year or two, and as long as the *vote of people is had on creating the debt.* If the people cannot be trusted to dispose of their own property who can do it for them? and if the voters have not the right to do it by a majority vote, who has the right? The people must have this right by a majority vote, or all public improvements in our municipalities must fail. Constitutions, legislatures and courts all rest upon the will of the people, and derive all the power they have from that source—and that will in this country is the majority of the people.

In the case at bar, the State Supreme Court of Missouri, have held in 57 and 58 Mo., *supra*, that there were no restrictions in the State Constitutions against the passage of the act by the Legislature under which these bonds were issued, and there is no pretence but that the City Council literally obeyed its demands. And that there was a two-thirds vote of the people, and a regular issue of the bonds in conformity with law, is not denied.

The two Supreme Court decisions of the State of Missouri, *supra*, are in the same line, and should be followed by this Court. This is not a case of taxation without consent, but with assent of

over two-thirds of the votes, and in accordance with municipal, legislative and constitutional authority, according to the decisions of the State Court of Missouri.

The *Topeka case* we do not consider analagous, nor a precedent, or the law as now administered in such cases as this at bar. If applicable at all to the case at bar, it comes under the following rule:

The rule well settled now seems to be: "That courts cannot nullify an act of the State Legislature *on the vague ground that they think it opposed to a general spirit supposed to pervade or underlie the Constitution, where neither the terms nor the implications of the instrument disclose any such restrictions.*"

Walker v. *Cincinnati*, 21 Ohio, 41.

The courts may determine whether the Legislative Act that grants to a municipality power to aid an enterprise in conformity with the Constitution of the State and Nation, and whether the municipality has legally executed the power granted by the Legislature. But courts have no power given them by the Constitution to set aside the Legislative Act of a co-ordinate branch of the government, when the Legislative Act, as in the case at bar, names the enterprise for which the municipality voted aid, and which was not prohibited by the State Constitution, as construed by their own State Supreme Court. A reasonable respect for a co-ordinate branch of the general government, and for the decisions of a State Supreme Court, would forbid such a decision by the Federal Courts. The State Supreme Court of Missouri refused to decide *what was a public purpose.*

They say, "*The State Constitution makes no distinction between a public and private purpose, and that Court refuses to do so.*"

The people and the legislatures are the parties to determine that issue in the first instance, as they are the direct source of all power. The people first pass upon it, and then the Legislature as the people organized for the purposes of legislation.

And to save expense and trouble of a direct vote upon every law they desire enacted, the people here act through their representatives. The only reasons why constitutions and constitutional amendments are held more sacred and potent than legislative enactments is because the people have voted upon every proposition they contain, and have directly approved of them as the organic laws of the State and Nation.

If these Constitutions are to be held sacred by the Courts and Legislatures for the reason that they express the will of the people directly and not by representation as in Legislative enactments, then why should not a municipality that votes aid, under Legislative authority and in conformity to the constitution of their State as interpreted by their Supreme Courts, to an enterprise they deem public, be allowed to express their will and be upheld by the Courts?

The courts are organized simply to execute the laws and not to make or change in any particular. The Legislature exists simply to put into legal form the will of the people on any given subject in harmony with the accepted Constitutions of the State and Nation.

In fact it is a majority or two-thirds vote that adopts all constitutions, that passes all legislative acts, all decisions of Appellate and Supreme Courts, and that makes *all laws for taxation.*

The people of the city of La Grange themselves decide as to whether the taxation they voted in this case was to be for a public or private purpose in *Section 1 of Article 6 of the charter of LaGrange (see laws relied in appendix)*, where they ordain that after the bonds voted to the Iron and Steel Co. are paid and the money refunded, that the city may have advanced or paid out as interest on such bonds, "*then these moneys (arising from such taxation) shall become a permanent school fund for the city, the interest of which shall be used for the support and maintainance of the public schools therein.*

Taxation, to however a limited extent, for the support of the public schools of the city, *is certainly for a public purpose.*

In *Allen* v. *The Inhabitants of Jay*, 290, *supra*, the court say:

"If the use or exgiency for which property is taken is public, the determination of the Legislature that the necessity of so taking it exists, *is conclusive.*"

Spring v. *Russell*, 7 Greenl. 273.

In this case it is conceded that the Legislature have the power to determine *when* an exigency exists for taking and using property for a public purpose. If the Legislature has the right to determine *when* the exegency exists for taking property for a public purpose, it must also have the power and right to determine *what is a public purpose*, or it could never decide when the exigency existed for taking the property.

"Such a power is denied to the courts, because to concede it would be to make Courts sovereign over both the Constitution and the people, and convert the government into a judicial despotism."

Golden v. *Prince*, 3 Washington's Cir. Court, 313.

"Subject to the Federal Constitution, the Legislature of the State possesses the whole legislative power of the people, except so far as the power is limited by the State Constitution."

Bank v. *Brown*, 26 New York, 467.
People v. *Draper*, 15 id. 532.
St. Louis Co. v. *Griswold*, 58 Mo. 175.

The rule now seems to be, that where the Constitution of the State contains no prohibition upon the subject, express or implied, neither the State nor Federal Courts can declare a statute of the State void as unwise, unjust or inexpedient, nor for any other cause, unless it is repugnant to the Federal Constitution. Except where the Constitution has imposed limits upon the legislative power, the rule of law appears to be that the power of the Legislature must be considered practically absolute, whether the law operates according to justice or not in any particular case, for the reason that courts are not the guardians of the people of the State, save where those rights are secured by some constitutional provision which comes within judicial cognizance; or as Chief Justice Marshall said: "The interest, wisdom and justice of the representative body furnish the only security in a large class of cases not regulated by any constitutional provision."

Bank v. *Billings*, 4 Peters, 533.
Cooly on Constitutional Lim. (3d ed.) 168.
Calder v. *Bull*, 3 Dallas, 398.

"It does not belong to courts to interpolate constitutional restrictions; our duty is to apply the law, not to make it. All power may be abused where no safeguards are provided. *The remedy in such cases lies with the people, and not with the judiciary.*"

Pine Grove v. *Talcott*, U. S. 19 Wall. 677.

If we are correct in the above, it follows that the coupons sued upon in this case, and the bonds to which they were attached, must be held valid, because they were issued in pursuance of the express authority of the Legislature of Missouri, vesting authority in the City of LaGrange for that purpose, and under an ordinance accepting that authority, and a vote of the electors in accord with the laws of that State; and because the State Constitution does not prohibit, in any manner specific or by implication, the passage of such an act, but expressly allows it on a vote of two-thirds of the electors of the municipality which accepted the power so granted; and because it is not competent for a Federal court to adjudge a State statute void which does not conflict in any respect with the Constitution of the United States or that of the State whose Legislature enacted the statute.

In the view we take of this case, we do not think the question of whether these bonds were issued for a *public purpose* or for the benefit of a *private corporation*, has anything to do with the case, for the reason that there was constitutional and legislative authority, and city ordinance and vote of the electors—full authority given, and a literal execution of the power in a legal way. But if the question of a *public purpose* enters into this case, we shall insist these bonds were issued for such a corporate purpose, or for a public purpose.

A *public purpose* has been defined as one "to promote the general prosperity and welfare of the municipality." This is the interpretation given to the decision of the State Supreme Court by the United States Supreme Court, in *Hackett* v. *Ottawa*, 99 U. S. 94. In this case, bonds issued by the city of Ottawa to *Ottawa*

Manufacturing Company, were held good. This case is similar in many points to the one at bar.

The Supreme Court of Illinois, in *Taylor* v. *Thompson*, held a corporate purpose to mean "a tax to be expended in a manner which should promote the general prosperity and welfare of the municipality which levied it." In above case, the tax was voted to pay bounty money to soldiers enlisting, as in the following citations:

Henderson v. *Logan*, 42 Ill. 361.
Briscoe v. *Allison*, 43 id. 291.
Misner v. *Bullard*, 43 id. 470.
Johnson v. *Campbell*, 49 id. 317.

The people voted the tax in those cases the same as in the case at bar.

In *Burr* v. *The City of Carbondale*, 76 Ill. 455, the court sustained a tax imposed by the city in support of the Southern Illinois Normal University, to which the people had voted a tax. These bonds were issued to *secure the location*, within its limits, of a State Normal University.

In *Hinsley Township* v. *The People*, 84 Ill. 544, it was held that bonds issued to *secure the location and erection of an Industrial University* at Urbana, were good, and issued for a corporate or public purpose.

In *Livingston Co.* v. *Darlington*, 101 U. S. 407, bonds issued to aid in the erection of buildings, and as a donation by the county to the *State Reform University*, were held good, as coming under a *corporate purpose or public purpose*. In that case, the Federal Supreme Court indorse or adopt all of the above cases cited, as expressing what may be done under the term *public purpose* or *corporate purpose by public municipalities*.

If a municipality can vote aid to the *Ottawa Manufacturing Company*, why not to the *Iron and Steel Company*? Is the one any more a private corporation than the other?

If municipalities could tax to pay bonds issued to pay bounties to soldiers who would enlist in the army, to prevent a draft that would fall upon only a few people, why not for the *Iron and Steel Company?* How can a municipality, as in the case of *City of Carbondale*, tax for a Southern Normal Unviersity, and Urbana for an Industrial University, and Livingston county for Reform School, all of them *State Institutions*, on the principle that they are of public municipal benefit, and the city of *LaGrange* not be allowed to tax for bonds issued to aid in the erection of buildings for the Iron and Steel Company, which built a large rolling mill, and spent several hundred thousand dollars in its erection. Can any one doubt that this mill is not of as much benefit to the municipality as the State institutions above stated, or the Ottawa Manufacturing Company? At any rate, there can be no difference in the principle, as applied to a corporate purpose or public purpose, and that the State institutions, and bounties to soldiers, and the Ottawa Manufacturing Company, and the public park near St. Louis were as much private corporations in their relations to the municipalities which aided them, as was the Iron and Steel Company to the city of *LaGrange*.

It will be claimed by the defense that there is a distinction between *becoming a stockholder in, or loaning credit to,* any company, association or corporation, which is the language of Section 14 of the Constitution, and *subscribing to the capital stock or making a donation*, etc., which is the language of the Legislative Act. But there can be no such distinction made,

for none exists, and the language in the Constitution and Legislative Act means the same thing. This question has been fully decided by both State and Federal courts.

In the *Chicago & Iowa R. R. Co. et al.*, 74 Ill. 279, the court, in discussing this question, say:

"It is conceded by appellees that the proviso saves *subscription* to stock previously voted, but insist it does not save *donations*. We cannot adopt a construction so narrow and technical. A reasonable construction of the whole section will embrace danations as well as subscriptions. In one sense of the term, *a donation is a subscription* to the capital stock of a company. We have no doubt, at the time the section was framed, there was then in the State quite as many donations voted as there were subscriptions to stock in any other manner, and if a necessity or reason existed to protect a subscription, there was also the same reason and demand to protect a donation; and we entertain no doubt it was the intention of the framers of the Constitution, by adding the proviso to the section cited *supra*, to place *subscriptions and donations on the same footing.*"

This decision and construction of the terms "subscription" and "donation," has been adopted and affirmed by the Federal Court in *Fairfield* v. *County of Gallatin*, 100 U. S. 47.

The language of the constitutional section, *to become a stockholder in*, or loan its credit, etc., implies a *subscription*, as in no other way could a party become a stockholder.

The Federal Courts have also held that the vote of the people to issue bonds, was a *subscription* for stock of the enterprise for whose aid the bonds were issued.

We therefore insist that these coupons must be held valid obligations of this defendant. There being ample legislative authority to the city of LaGrange, and a full compliance with the power granted by the Legislature, and no constitutional prohibition, and a vote of assent by the people, the acts of

the defendant were not *ultra vires*, and it is estopped from denying its own acts. If there is no constitutional prohibition, these coupons and bonds were legally issued, and we claim all the rights of a *bona fide* holder for value, without notice.

We think these coupons should be held good, because there is no specific or implied prohibition in the Constitution to their issue, but full authority given on a two-thirds vote of the electors, which was had and so announced in the mayor's proclamation. [*See laws relied on.*] Because there was full legislative authority in the act of March 9, 1871, under which they were issued; and because, by the ordinance, the city council strictly complied with the legislative authority in the call and election and the vote of the people. Because the Supreme Court of Missouri has decided that there is no discrimination between public and private corporations made in Section 14 of the State Constitution; and because the complainant is a *bona fide* holder for value, before maturity and without notice, and has, we think, both the law and equity with him in this case.

"*In proceedings for enforcement of payment of municipal bonds, the policy of the Federal Courts is to sustain, if possible, the validity of the bonds, and they will refuse to invalidate the same, except for grave and serious infirmities, even when the question which arises is a doubtful one. A construction should be given to the statute which upholds the bonds, rather than one which invalidates them in the hands of a bona fide holder.*"

Rich v. *Town of Mertz*, Circuit Court, N. D., N. Y., September, 1883.

We only ask that this policy of the Federal courts be applied to this case, which we do not consider even a doubtful one, and that these coupons be sustained.

GEO. A. SANDERS,
For Plaintiff.

APPENDIX.

LAWS RELIED ON.

CONSTITUTION OF MISSOURI OF 1865, SEC. 14, ART. 11.

"The General Assembly shall not authorize any county, city or town to become a stockholder in, or loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

"AN ACT TO AMEND AN ACT ENTITLED 'AN ACT TO INCORPORATE THE CITY OF LAGRANGE,' APPROVED FEBRUARY 24, 1853."—[PRIVATE LAWS 1871, P. 168.]

"SEC. 1. That section one of article six, of 'An act to incorporate the City of LaGrange,' approved February 24, 1853, be and is hereby amended so as to read as follows: The city council shall have power to levy and collect taxes upon all real and personal property within the limits of the corporation, not to exceed one-half of one per centum per annum upon the assessed value thereof, in any manner to be provided by ordinance, not repugnant to the Constitution of the State of Missouri. And whenever twenty-five persons, who are tax-payers and residents of the city of LaGrange, shall petition the city council, setting forth their desire to donate or subscribe to the capital stock of any railroad or manufacturing company, or for the improvement of any road leading into the city, or for increasing the trade, travel or commerce thereof, or for securing the location and maintainance of any manufacturing company, stating the terms and conditions on which they desire such donation or subscription to be made, it shall be the duty of the city council to order an election, at which the qualified voters shall be allowed to vote. And if it shall appear from the returns of said election, that two-thirds of the resident tax-payers have voted in favor of said donation or subscription, it shall be declared carried, by proclamation of the mayor, and a special tax, of not exceeding two per centum per annum, may be levived on the assessed value of all real and personal property, to pay such donation or subscription. And the city council shall, under the hand of the mayor, and attested by the seal of the city, issue bonds of the City of LaGrange to the amount of the capital stock so subscribed, or to the amount of the donation made to any such enterprise, or for any purpose hereinbefore specified; which said bonds shall be conditioned upon the proposition submitted and voted upon at the election held for that pur-

pose, and said bonds shall not bear a greater rate of interest than ten per centum per annum.

SEC. 2. All acts and parts of acts inconsistent with this act, are hereby repealed.

SEC. 3. This act shall take effect and be in force from and after its passage.

Approved March 9, 1871."

SECTION 1, OF ARTICLE 6, OF THE CHARTER OF LAGRANGE CITY, MO.

"The city council shall have power to levy and collect taxes upon all the real and personal property within the limits of the corporation, not to exceed one-half of one per centum per annum upon the assessed value thereof, in any manner to be provided by ordinance not repugnant to the Constitution of the State of Missouri. And whenever twenty-five persons, who are tax-payers and residents of the city of *LaGrange*, shall petition the city council, setting forth their desire to donate or subscribe to the capital stock of any railroad or manufacturing company, or for the improvement of any road leading into the city, or for increasing the trade, travel or commerce thereof, or for securing the location and maintainance of any manufacturing company, stating the terms and conditions on which they desire such donation or subscription to be made, it shall be the duty of the city council to order an election to be held, at which the qualified voters of said election shall be allowed to vote; and if it shall appear, from the returns of said election, that two-thirds of the resident tax-payers have voted in favor of such donation or subscription, it shall be declared carried, by proclamation of the mayor, and a special tax, of not exceeding two per centum per annum, may be levied on the assessed value of real and personal property, to pay such donation or subscription; and the city council shall, under the hand of the mayor, and attested by the seal of said city, issue bonds of the City of LaGrange to the amount of the capital stock so subscribed, or to the amount of the donation made by any such enterprise, or for any other purpose hereinbefore specified; which said bonds shall be conditioned upon the proposition submitted and voted upon at the election held for that purpose, and said bonds shall not bear a greater rate of interest than ten per centum per annum. And when such bonds shall have been so issued, all the taxes levied for State and county revenue, and all special taxes, of whatever kind, upon the property of such manufacturing companies, and other manufacturing enterprises within the limits of the city of LaGrange, to the procurement, erection and maintainance of which any aid, as above specified, shall have been, or may be hereafter given by said city, shall annually be levied and collected in the usual manner, and when so collected, shall be paid

by the collector of Lewis county to the treasurer of the City of LaGrange, the county collector taking duplicate receipts therefor—one of which shall be filed with the city auditor. The city treasurer shall hold the amounts so received until three thousand dollars may be in his hands, and whenever the sum so received amounts to this sum (of three thousand dollars,) it shall be his duty, under the direction and order of the city council, to take bids for bonds of the city of LaGrange, and purchase said bonds at the lowest possible rate not exceeding the par value thereof; and if no such bonds are offered at their par value, or less, he shall then, upon order of the city council, invest the said money in interest-bearing securities of the United States, State of Missouri or Lewis county, having a market value, at that value, and then form a sinking fund; and under the order of the city council, he shall, at any time, purchase and cancel the bonds of the City of LaGrange with any money or securities which may be in the sinking fund: *Provided*, said city bonds are bought at par value or less, and said money or securities shall be used for no other purpose than as above specified, until all the bonds of the City of LaGrange, so issued, shall have been purchased and canceled (and the City of LaGrange refunded all moneys it may have advanced or paid out as interest on such bonds), and then these moneys shall become a permanent school fund for the city, the interest of which only shall be used for the support and maintainance of the public schools therein."

PROCLAMATION OF THE MAYOR.

"Whereas, at a special election held in the City of LaGrange, Mo., on the 4th day of October, 1871, for the purpose of submitting a proposition to the qualified voters and tax-payers to donate two hundred thousand dollars and a suitable piece of ground to the LaGrange Iron and Steel Company, or to I. R. Adams and his associates, for the purpose of erecting and maintaining an iron rolling mill in said city, there were 236 votes cast 'for the donation,' and *four* 'against donation,' and one vote 'for the rolling mill.'

Now, therefore, I, Joseph A. Hay, mayor of the City of LaGrange, in compliance with the charter and ordinance for submitting said proposition to a vote of the people, do hereby declare said proposition adopted by a two-thirds vote of the qualified voters of said city.

In testimony whereof, I have hereto set my hand, and caused to be affixed the seal of the city. Done at the City of LaGrange, Missouri, this 6th day of October, A. D. 1871.

JOSEPH A. HAY, [SEAL.]
Mayor.

By the Mayor:
Attest: ROBERT MCCHESNEY,
City Clerk."

CERTIFICATE OF CITY CLERK.

"I, Robert McChesney, clerk of the City of LaGrange, Mo., do hereby certify * * * that the vote authorizing the issue of bonds to the LaGrange Iron and Steel Company, or I. R. Adams and associates, was taken under an amendment of the city charter of the City of LaGrange, Mo., passed by the Legislature of the State of Missouri, March 9, 1871; that the official returns show 236 votes in the affirmative and four in the negative, and that the proceedings of the said election were formal and regular, as by law provided.

ROBERT MCCHESNEY, [SEAL.]

Nov. 4, 1871. *Clerk of the City of LaGrange, Mo.*"

CERTIFICATE OF SECRETARY OF STATE OF MISSOURI AS TO LAGRANGE IRON AND STEEL COMPANY BEING BODY POLITIC AND CORPORATE.

"STATE OF MISSOURI,

CITY OF JEFFERSON, Oct. 30, 1871.

"Whereas, Isaac R. Adams, George H. Simpson and John M. Glover have filed in this office a certificate, or declaration in writing, as provided in Sec. 4, Art. 1, Chapter 37, of Wagner's Statutes of the State of Missouri, setting forth all the facts therein required, and having, in all respects, complied with the requirements of law governing the formation of private corporations for manufacturing and business purposes, as contained in Articles 1 and 7 of Chapter 34 of said statutes;

Now, therefore, I, Eugene F. Weigel, Secretary of State of the State of Missouri, in virtue and by authority of law, do hereby certify that said parties, their associates and successors, have become a body politic and corporate, under the corporate name of the 'LaGrange Iron and Steel Company,' and by that name have the right to sue and be sued, purchase, hold and convey real and personal property, and to have and enjoy all the rights and privileges granted to manufacturing and business corporations under the laws of this State, subject to their articles of Association, and all legal restrictions and liabilities in relation thereto.

EUGENE F. WEIGEL,

In testimony, etc. *Secretray of State.*"

[SEAL.]

CONSTITUTION OF MISSOURI, REVISED STATUTES OF 1878, ADOPTED OCT. 30, 1875, IN FORCE NOV. 30, 1875, ART. 9, SEC. 6.

* * * "*Provided, however*, That nothing in this constitution contained shall affect the right of any such municipality to make such subscription, where the same has been authorized under existing laws by a vote of the people of such municipality prior to its adoption, or to prevent the issue of renewal bonds, or the use of such other means as are or may be prescribed by law for the liquidation or payment of such subscription, or any existing indebtedness."

113-1

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1884.

WILLIAM A. COLE,

Plaintiff in Error.

vs.

THE CITY OF LA GRANGE,

Defendant in Error.

SUBMITTED UNDER RULE 20.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

DAVID WAGNER,

For Defendant.

—IN THE—

Supreme Court of the United States.

OCTOBER TERM, 1884.

WILLIAM A COLE,
Plaintiff in Error.

Against

THE CITY OF LA GRANGE,
Defendant in Error.

Submitted under Rule 20.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

The plaintiff in error brought his action in the United States Circuit Court for the Eastern District of Missouri, upon coupons cut from bonds issued by the City of La Grange, defendant in error. These bonds were issued under an ordinance of the City of La Grange passed and approved September 22, 1871, making a donation of said bonds to the La Grange Iron and Steel Company, two-thirds of the voters of said city having previously assented thereto.

The ordinance was passed in pursuance to an act of the legislature of Missouri, entitled "an act, to amend an act, entitled

'an act to incorporate the City of La Grange,'" approved March 9, 1871, which became a law and went into effect from and after its approval.

The answer of defendant in error, denied each and every material allegation contained in plaintiff's petition, and for a further and special defence set up: That the act of the legislature mentioned in the petition, approved March 9, 1871, attempted to give and by terms did give to the said city defendant, authority to make gifts and donations to private manufacturing associations and corporations, and that the said city council of said defendant purporting to act under such power or authority by an ordinance adopted September 22, 1871, did submit to a vote of the citizens of said defendant a proposition to give or donate to the La Grange Iron and Steel Works, a *private manufacturing company*, formed and established for the purpose of carrying on and operating a rolling mill, the sum of two hundred thousand dollars, and in accordance with said ordinance the bonds of said city defendant were issued, together with interest coupons attached thereto, a part of which coupons are the ones set forth and described in the petition and therein sued on.

The answer further averred that the said bonds and coupons were issued to said manufacturing company, which was a strictly private enterprise formed and prosecuted for the purpose of private gain, and which had nothing whatever of a public character, and that it was incompetent for the legislature to grant authority to cities or towns to make donations and issue bonds to mere private companies, or associations, having no public functions to perform, and the act of the legislature and the ordinance under which the city acted were void, and that the bonds and coupons were issued without any legal authority.

To this answer the plaintiff filed a general demurrer, which was overruled by the court, and judgment was then given for defendant, from which judgment plaintiff has prosecuted his writ of error.

It will thus be seen that the only question presented is, whether the defendant the City of La Grange, had any legal authority to issue the bonds and coupons in controversy to a mere private manufacturing company, to be used exclusively for private gain and emolument, and exercising no public employment, and engaged in the performance of no public function.

If there was no authority to make the donation and issue the bonds and coupons, then they are void—wheresoever they may be.

The following is the amendatory act of the legislature, giving the city power to make the donation:

"Sec. 1. That section one of article six, of 'an act to incorporate the city of La Grange,' approved February 24, 1853, be and is hereby amended so as to read as follows: The city council shall have power to levy and collect taxes upon all real and personal property within the limits of the corporation, not to exceed one-half of one per centum per annum upon the assessed value thereof, in any manner to be provided by ordinance not repugnant to the constitution of the State of Missouri. And whenever twenty-five persons, who are taxpayers and residents of the city of La Grange shall petition the city council, setting forth their desire to *donate* or subscribe to the capital stock of any railroad or *manufacturing* company, or for the improvement of any road leading into the city, or for increasing the trade, travel or commerce thereof, or for securing the location and maintenance of any *manufacturing company*, stating the terms and conditions on which they desire such donation or subscription to be made, it shall be the duty of the city council to order an election, at which the qualified voters shall be allowed to vote. And if it shall appear from the returns of said election that *two thirds of the resident taxpayers* have voted in favor of said donation or subscription, it shall be declared carried by proclamation of the mayor, and a special tax, not exceeding two per centum per annum, may be levied on the assessed value of all real and personal property, to pay such donation or subscription. And the city council shall under the hand of the mayor, and attested by the seal of the city, issue bonds of the city of La Grange to the amount of the capital stock so subscribed, or to the amount of the donation made to

any such enterprise, or for any purpose hereinbefore specified; which said bonds shall be conditioned upon the proposition submitted and voted upon at the election held for that purpose, and said bonds shall not bear a greater rate of interest than ten per centum per annum."

Laws of Mo. 1871, p. 168.

When this act was passed the following provisions of the constitution were in force:

"That no private property ought to be taken or applied to public use without just compensation." Art. I., § 16.

* * * "that all men are endowed by their creator with certain inalienable rights among which are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." Art. I., § 1.

* * * "that the accused," &c., * * * "nor be deprived of life, liberty, or property, but by the judgment of his peers or at the law of the land." Art. I., § 18.

"The General Assembly shall not authorize any county, city or town to become a stockholder, or loan its credit to any company, association or corporation, unless *two thirds of the qualified voters* of such county, city or town, at a regular or special election to be held thereon, shall assent thereto." Art. II., § 14.

It will be perceived that the law which gave the city authority to hold the election and issue the bonds is at variance with the section of the constitution from which the power is sought to be deduced. The act declares that "if it appears from the returns of said election, that two-thirds of the *resident taxpayers* have voted in favor of said donation or subscription, it shall be declared carried," &c.

The constitutional provision requires the assent of *two-thirds of the qualified voters.* This is a fatal defect; there may be a great difference between the resident taxpayers and the qualified voters, and two-thirds of the resident taxpayers may not constitute two-thirds of the qualified voters. The legislative act amendatory of the charter, and the submission were therefore unauthorized by the constitution, and any proclamation

by the mayor declaring the proposition carried by two-thirds of the qualified voters was *ultra vires*.

Now the law undertakes to tax the citizens two per cent. on the assessed value of all their property, both real and personal, to pay the bonds and interest which had been donated—given as an absolute gift to certain individuals for their private gain—to an enterprise strictly private, subject to no governmental control, as in the case of railroads, common carriers, &c. The only reason why subscriptions to railroads are held valid, is because they exercise a kind of public office, and have certain public duties to perform. It is upon this ground also that they are permitted to exercise the right of eminent domain, Munn vs. Illinois, 94 U. S., 213. Although they are private corporations, they have public duties to perform which bring them under the direct control of the public, and from which they cannot absolve themselves.

In New Jersey Steam Navigation Co. vs. Merchants' Bank, 6 How, 344, it was said that a common carrier is "in the exercise of a sort of public office, and has public duties to perform, from which he should not be permitted to exonorate himself without the consent of the parties concerned." It was ruled in Olcott vs Supervisors, 16 Wall, 678, that railroads are public highways, established by authority of the State for the public use, and that they are none the less public hublic highways because controlled and owned by private corporations; that it is a part of the functions of government to make and maintain highways for the convenience of the public; that no matter who is the agent, or what is the agency, the function performed is that of the State; that although the owners may be private companies, they may be compelled to permit the public to use these works in the manner in which they can be used; that upon these grounds alone have the courts sustained the investiture of railroad corporations with the State's right of eminent domain, or the right of municipal corpora-

tions, under legislative authority, to assess, levy and collect taxes to aid in the construction of railroads. In Township of Queensbury vs Culver, 19 Wall 83, it was said that a municipal subscription of railroad stock was in aid of the construction and maintenance of a public highway, and for the promotion of a public use. And again, in Township of Pine Grove vs. Talcott, 19 Wall 666, it was declared, that: Though the corporation (railroad) was private, its work was public, as much so as if it was to be constructed by the State. And such is the current of the authorities, both state and national.

It is conceded by the best authorities that the courts have gone quite far enough in upholding the right of taxation to promote these undertakings, although they may have a public character attached to them, and be compelled to perform a public function. Many of the best jurists in the land have regretted that a stricter limitation was not placed upon the exercise of this power. But admitting that the power is firmly established, as to the class and kind of persons and corporations above mentioned, when it is attempted to extend it so as to arbitrarily, by coerced taxation to give and donate the people's money to strictly private individuals, to aid them in their private enterprises, conducted and carried on exclusively to promote private ends, the exercise of the power is wholly undefensible; it is confiscation—legal robbery.

Taxes are levied and imposed by authority of government, upon its citizens for the support of the State.

They are imposed for the use of the people of the State for the purposes of government, and not for private objects or for the benefit of individuals, "I concede," says Black C. J. in Sharpless vs. Mayor, &c., 21 Penn St. 167, "that a law authorizing taxation for any other than public purposes is void."

Of what effect is the provision in the constitution, that all men "are endowed with certain inalienable rights, among which are life, liberty, the enjoyment of the fruits of their own labor

and the pursuit of happiness," if the enjoyment of the fruits of their own labor, if the tenure of their property is at the will of others? How can men's property be protected, if the legislature can enable a certain number of voters by absolute gift, to transfer to certain favored individuals, through the medium of taxation, such portions of their estates as may be deemed expedient. The conqueror and the tax gatherer in such a proceeding appropriate the citizens' property through different means, but they both arrive at precisely the same result.

Again, even in the exercise of the inherent right of eminent domain, it is declared: "That no private property ought to be taken or applied to public use without just compensation." Two elements are required to bring a case within the provision of the constitution—a public use and just compensation. Is the erection of a rolling mill to be carried on for the individual gain and profit of the owners a public use? What compensation does the tax payer receive, any more than he gets from a store, a bank or any other private establishment carrying on business in the same town? If property can only be legally taken for a public use by making just compensation, surely it cannot be taken for a private use, where no compensation at all is made.

The constitution further declares that no person can "be deprived of life, liberty or property but by the judgment of his peers or the law of the land."

Property taken by taxation to be given to a private individual, is not taken by the judgment of one's peers. A law in direct opposition to the essential principles of justice—in plain and palpable violation of the rights of property, is not the "law of the land" in the meaning of the constitution. It has always been supposed that since the days of *Magna Charta* the citizen held his property by a tenure free from the arbitrary and unrestrained exercise of power on the part of the government.

Johnson J. in speaking for the court in Bank vs. Oakley, 4

Wheat, 235 says: "As to the words from *Magna Charta* * * * after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

What principle of private right or distributive justice is there in taking the property of the citizen against his will, and without compensation, and donating it to a private person? If it can be given for one purpose it can for another. If it can be given for a rolling mill, it can be given for a cooper shop, a wagon manufactory, or almost any other purpose having the ostensible object in view of carrying on some industrial pursuit. It may be prostituted to the most shameless favoritism. It holds out inducements to mere adventurers, who, without money, make glowing promises till they get the people's money in their pockets, and then abandon the work, as was actually done in this very case now in controversy, leaving the people with an onerous burden, without any benefits. The supposed benefit or compensation is generally purely speculative or illusory. What guarantee is there that the enterprise will ever be kept in operation if it succeeds in being established? What will prevent it from being removed to another location if greater inducements are held out there?

In the leading case of Loan Association vs Topeka, 20 Wall 655, the Citizens' Savings and Loan Association of Cleveland brought their action against the City of Topeka, on coupons for interest attached to bonds of the City of Topeka. The bonds on their face purported to be payable to the King Wrought Iron Bridge Manufacturing and Iron Works Company, of Topeka, to aid and encourage the company in establishing and operating bridge shops in said city of Topeka, under and in pursuance of certain acts of the legislature of Kan-

sas. One of the acts unquestionably gave the power to the city to make a donation to the company, if the legislature could confer such power to encourage the establishment of manufactories and such other enterprises as might tend to develop and improve such city, either by direct appropriation from the general fund or by the issue of the bonds of such city, in such amounts as the council may determine. Provided, That no greater amount than one thousand dollars should be granted for any one purpose, unless a majority of the votes cast at an election called for that purpose should authorize the same," &c.

It was conceded that the steps required by this act pre-requisite as to issuing the bonds were regular, as were also the other details, and that the language of the statute was sufficient to justify the action of the city authorities, in making the donation to the company, if the statute was within the constitution-competency of the legislature.

Section 5 of the constitution of Kansas contained these words: "Provision shall be made by general law for the organization of cities, towns and villages; and their power of taxation, assessments, borrowing money, contracting debts, and loaning their credit, shall be so restricted as to prevent the abuse of such power."

The contention on the part of the city in opposition to the validity of the bonds was, that the act authorized the towns and other municipalities to which it applied, by issuing bonds or lending its credit, to take the property of the citizen under the guise of taxation to pay these bonds, and use it in aid of the enterprises of others which were not of a public character; that it was a perversion of the right of taxation, which could only be exercised for a public use, to the aid of individual interests and personal purposes of profit and gain.

This position was sustained by the court in a learned, elaborate and instructive opinion. Among other things, it is said:

"If these municipal corporations, which are in fact subdivisions of the State, and which for many reasons are vested with quasi legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the State to authorize them to use it in aid of projects strictly private or personal, but which would in a secondary manner contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source.

"But such instances are few and exceptional, and the proposition is a very broad one, that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in the future, not limited to payment from some other source, imply an obligation to pay by taxation * * * We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power of the State legislature to tax the people, but conceded that when the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private rights.

"It must be conceded that there are such rights in every free government *beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism.* It is true it is a despotism of the many, or of the majority, if you choose to call it so, but it is

none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many. The theory of government, state and national, is opposed to the deposit of unlimited power any where, the executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

"There are limitations on such powers which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to that name, * * * * * But in the case before us, in which the towns are authorized to contribute by way of taxation to any class of manufacturers, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufacturers, the same may be said of any other business or pursuit which employs capital and labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two thirds of the business men of the city or town."

In the case of Parkersburg vs. Brown, 106 U. S. 487, the act of the legislature of West Virginia authorizing the city of Parkersburg to issue its bonds for the purpose of lending the same to persons engaged in manufacturing was declared invalid, and the bonds issued under it as against the city, were held to be absolutely void, and the city was allowed to recover back

interest that it had paid on the bonds.

The court in the opinion says:

"Taxation to pay the bonds in question is not taxation for a public object. It is taxation which takes the private property of one person for the private use of another person."

A statute in the state of Nebraska authorized any county or city in the State to issue bonds to aid in the construction of any railroad, or other work of internal improvement, and it was held that this would not authorize the issuing of bonds to aid in the building of a grist mill. Osborn vs. county of Adams, 106 U. S. 181; S. C. 109 U. S. 1.

So in the very recent case of Ottawa vs Carey, 108 U. S. 110, the question was re-examined, and the doctrine was again reiterated that a municipality cannot make a donation to a private undertaking for a private use, where the money to pay the amount so given is to be raised by taxation.

In Allen vs. Jay, 60 Maine 124, the Supreme Court of Maine, speaking through Appleton C. J. in a most learned and exhaustive opinion, held, that the legislature of the State had no power to pass a law authorizing a town to raise money either by taxation or issuing its bonds, and loan the same to private parties to enable them to erect mills and manufactories in such towns, thereby to increase its wealth and business, as well as the accommodation of its inhabitants. That such an object was entirely a private one, and in no sense entitled to be called a public use of such a character as to justify the imposition of taxes upon the inhabitants and property of a town by the vote of the majority of such town.

The case of Lowell vs. Boston, 111 Mass. 454, grew out of an act of the legislature, at a special session, called largely for that purpose, by which the city was authorized to issue bonds, not exceeding $20,000,000 at five per cent. interest when payable in gold, or six per cent. if payable in currency. The avails

of these bonds to be loaned to the owners of land upon which buildings were destroyed by the great fire. Commissioners were appointed to manage the loan, and were required to take a first mortgage upon the land at less than three-fourths its value, as security for the money advanced, at seven per cent. interest. Here was a case where there could be no reasonable danger of loss, and a high probability of some gain to the city by means of the larger rate of interest paid by the borrowers than that paid by the city. There could be no question either that such a proceeding would afford great accommodation to the property owners on the "burnt district," and that it would greatly conduce to the speedy restoration of that portion of the city, and thus materially tend to the increase of the wealth and business prosperity of the city, and to some extent to the greater convenience, accommodation and prosperity of the inhabitants of the city generally.

The case was most ably argued, the late Judge Curtis being one of the distinguished counsel in favor of the validity of the law, and yet with all the light that could be shed upon the question, and with all these facts, and when it was apparent that the city could suffer no loss, the court unanimously came to the conclusion that the statute was void, and perpetually enjoined all proceedings under it.

Authorities might still be added in the same direction, but it is unnecessary.

Enough has been shown to justify the assertion that courts have wisely determined to place a limit on the power of interested parties through the legislature to carry forward private enterprises by reason of taxation.

But it is contended that the Supreme Court of Missouri in State vs Curators of State University, 57 Mo. 178, has given a construction to section 14 of Article II. of the State constitution which makes these bonds valid. But this is founded on a

total misapprehension of the decision in that case. No such question was before the court, and no such decision was made, or could have been made. In that case under an act of the legislature, the county of Phelps undertook to issue its bonds to secure the location of the school of mines and metallurgy, a branch of the State University, at Rolla, without submitting the question to a vote of the people of the county. It was urged that as the bonds were to be issued to a public corporation, for public purposes, the requirement of the constitution as to a two-thirds vote, did not apply. But the court held, that a law authorizing the issue of bonds without the sanction of two thirds of the voters of the county was void. That the section in the constitution was not intended to be limited to private corporations, but applied also to those of a public nature. Whether a vote was necessary to issue bonds to a public corporation was the sole question in the case, and all that was decided.

It is true the judge who delivered the opinion in his argument and illustrations made use of some expressions, which if taken isolated and alone and wrested from the text, might be tortured into a different meaning. But when taken together and considering the question before the court, the language is no authority for the doctrine contended for.

The opinion says, p 182 *et seq:* "It is not pretended that the provision of the constitution was complied with, but it is urged that the subscription or loan of credit of Phelps county to the university was to a public corporation, and therefore not within the meaning of the constitutional restriction.

"That the curators of the University constitute a corporation is not denied, but it is that the provision of the constitution was directed solely against subscriptions to private corporations. The language of the section makes no discrimination of the sort, nor the main purpose of the prohibition require any such discrimination. What was the object of restric-

tion on county courts, city and town municipalities? The object was plainly to prevent them from taxing the people, without their consent. No loan or credit was allowed to any company, association or corporation, without the consent of the people who had to pay it. The business of the company, association or corporation is not referred to in the constitution. Whether educational, benevolent, industrial or otherwise, whether public or private, the object is not considered. It is manifestly the intention of the constitution to prevent taxation without the assent of the tax payers and without regard to the purposes of the proposed tax.

"What right then has this court to interpolate the word 'private' into this section of the constitution?

"The corporation to which the bonds in question were issued, was in some respects a public corporation, and established for educational purposes—an object always held in high regard by the State; but why is this object, however laudable, to overturn a plain provision of the constitution, or to authorize a taxation which the constitution forbids?

"It may be that the corporation in this case is instituted to perform a more important public enterprise than one which proposes to build a road or bridge, or canal, and it may be that the state has fostered it as a public enterprise. Individuals may subscribe to it, but when a county court undertakes to subscribe and pay the subscription by county bonds, and by taxation to pay these bonds, it is difficult to see how such subscriptions and bonds are to occupy any different position from county bonds for any purpose of internal improvement or otherwise. The corporations proposing to build said roads and bridges, etc., are called private corporations, although for many purposes they are regarded as public corporations, and in exercising the power of eminent domain undoubtedly exercise a public function, granted by the state, and so far are public corporations."

The above opinion when rightfully read and construed, gives no aid or countenance whatever to the doctrine contended for. It will be perceived that the private corporations that the learned judge was speaking of, such as railroads, canals, etc., are the very corporations that are of a public nature, and as he says possesses the power of exercising the right of eminent domain. There is but one single sentence from which a contrary principle could be inferred, and that is where he speaks of corporations, whether educational, benevolent, industrial or otherwise. This language was merely used as illustration, and was never intended to assert the principle to which it is attempted to apply it. If it was it is pure *dicta* and is of no authority in the case and could have nothing to do in deciding it. Expressions of opinion do not control a case, where they go beyond the merits and facts in controversy.

Said Marshall C. J., in delivering the opinion of the court in Cohens vs. Virginia, 6 Wheat 399: "It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of the rule is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

So in the case of Carroll vs. Carroll's Lessee, 16 How, 287, the court said: If the construction put by the court of a State upon one of its own statutes was not a matter in judgment, if it might have been decided either way without effecting any right brought into question, then according to the principles of common law, an opinion on such a question is not a decision. To make it so, there must have been an application of

the judicial mind to the precise question necessary to be determined to fix the rights of the parties, and decide to whom the property in contestation belongs. And, therefore, this court, and other courts organized under the common law, has never felt itself bound by any part of an opinion in any case, which was not needful to the ascertainment of the right or title in question, between the parties. In Cohens vs. Virginia, 6 Wheat 399, this court was much pressed with some portion of its opinion in the case of Marbury vs. Madison. And Mr. Chief Justice Marshal said, * * * * * The case of *ex parte* Christy 3 How, 383, and Peck vs. Jenness *et al* 7 Ibid 612, are an illustration of the rule, that any opinion given here or elsewhere cannot be relied on as binding authority, unless the case called for its expression."

Now the only question presented for adjudication in the case of State vs. Curators of the University, was whether a two-thirds vote was necessary to enable the county of Phelps to issue bonds to the school of mines, and all else contained in the opinion was mere obiter, and not binding authority. The learned Judge (Treat) who decided this case in the lower court, and who possesses a most thorough knowledge of Missouri law, promptly and unhesitatingly repudiated the construction sought to be put upon the opinion of the Missouri court.

When the constitution was formed the only associations, companies or corporations, in which stock had ever been taken, or to whom subscriptions had ever been made, were railroads, plank roads, and such like companies partaking of a public nature, and it was to this class of companies solely and exclusively, that the framers of that instrument had reference. No effort had ever been made to pervert that power to private uses for private ends.

But under no possible circumstances can this case be brought within the constitutional provision. Here was a gift or donation.

The constitution only applies to subscriptions of stock and loaning of credit. There was no subscription or becoming a stockholder, and a loaning of credit implies a return of something at some time. Story on Bailen, § 257, *et seq* Webster's Dictionary—*Loan*.

But it is argued that the clause in the constitution embraces donations as well as subscriptions, and Fairfield vs. County of Gallatin, 100 U. S. 47, is cited as authority upon this point. An examination of that case will show that it is entirely different from the present case, and is no authority here. That case simply followed the construction placed upon a provision of the Illinois constitution, by the Supreme Court of the State of Illinois, and the provision is in every respect wholly different from the Missouri constitution. In fact it has no bearing in this case whatever.

The section in the Illinois constitution is as follows: "No county, city, town, township or other municipality shall ever become subscriber to the capital stock of any railroad or private corporation, or make donation to, or loan its credit in aid of such corporation. Provided, however, that the adoption of this article shall not be construed as affecting the right of any such municipality to make such subscriptions, where the same have been authorized under existing laws, by a vote of the people of such municipalities, prior to such adoption."

In the Town of Concord vs. Portsmouth Savings Bank, 92 U. S. 625, it was held that donations by counties or other municipalities to railroad companies were prohibited by the Illinois constitution, and that they could not lawfully be made after July 2, 1870, the date the constitution took effect, though they had been authorized by a prior statute and by a vote of the people of the county or municipality before the adoption of the constitution.

This would seem to be the natural and just construction of

that instrument, but subsequently the question came before the Supreme Court of Illinois, and that court in construing the section, used this language: "At the time the section of the constitution referred to was framed, large sums of money in different parts of the State had been voted by municipalities to be subscribed and donated to railroad companies, on condition that railroads then being constructed should be completed within a given time; and the country, whether wisely and judiciously or not, seemed to demand that in cases where the people in these municipalities had, under then existing legislation, voted to aid railroads by subscription or donation prior to the adoption of the constitution, such subscription or donation should not be effected by the formation of the constitution. And we have no doubt it was in view of this demand of a large portion of the State that the proviso was engrafted in the foregoing section, * * * * * A reasonable construction of the whole section will embrace donations as well as subscriptions. In one sense of the term, a donation is a subscription to the capital stock of a company. We have no doubt, at the time the section was formed, there was then in the State quite as many donations voted as there was subscriptions to stock in any other manner, and if a necessity or reason existed to protect a subscription, there also existed the same reason and demand to protect a donation; and we entertain no doubt it was the intention of the framers of the constitution, by adding the proviso to the section, to place subscriptions and donations upon the same footing."

The difference between that case and the present one is so palpable that it does not seem to require any comment. There the law in express terms authorized the municipalities to make subscriptions and donations, and the court says that as many donations were made as subscriptions, and although the provision in the constitution saving those subscriptions where they had previously been valid, did not name donations, yet the same reason existed for imparting to them validity, and